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No. 91-1715

In The

Supreme Court of the United States

October Term, 1991

SEA-LAND SERVICES, INC.,

Petitioner,

vs.

JOHN FANOLI and MOLLI FANOLI, his wife,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the opinions of all the Circuit Courts, consistently holding that a harbor worker's right to sue his vessel owning employer for negligence in its dual capacity as a vessel owner under 33 U.S.C. § 905(b) is not limited to those harbor workers who are longshoremen, are wrong.

2. Whether the holdings of those cases have caused problems of national concern and subverted the purposes of Congress in enacting the 1972 and 1984 amendments to the Longshore and Harbor Workers Compensation Act.

3. Whether the petitioner has raised any other issue worthy of Supreme Court review.

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RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The Fifth Circuit has on at least four occasions specifically addressed the issue of whether the right of a harbor worker to sue his vessel owning employer for negligence in its dual capacity as a vessel owner is limited to one class of covered employee. Each time it found no such limitation. Several other Circuits,

specifically the Second, Fourth and Eleventh as well as the District Court of Maryland have either implicitly or explicitly found the same result. It will be demonstrated that the reasoning in these cases is supported by principles of statutory construction and is consistent with implementing the intentions of Congress in enacting the 1972 and 1984 amendments to the Longshore and Harbor Workers Compensation Act. The decision of the Appellate Division of New Jersey certainly does not conflict with the decision of any other court anywhere.

Not only is there an absence of any conflicting legal precedent in the present case, there is not even an important problem of national concern which would justify Supreme Court review of this matter. Suits by nonlongshoremen covered employees have been recognized since 1980 and petitioner cannot show there has been a measurable increase in litigation. The reason there is no such problem is obvious. The 1972 and 1984 amendments combined with the interpretive case law have achieved their objectives.

Interpreting 905(b) to permit a covered employee to sue his employer, having a second separate and definable personna as a vessel owner, is consistent with achieving one of the primary stated purposes of the Act. This was to place longshoremen and other harbor workers in the same position as their land based counterparts with respect to third party suits. (*See* 92d Cong. 2d Sess. H.R. Report No. 92-1441.)

Petitioner's arguments as to the right to a jury trial are wholly without merit since there is clear authority at least for a discretionary right to have factual disputes resolved by a jury. Moreover there is an independent basis for the jury trial because of the presence of diversity. The arguments as to prejudgment interest and loss of consortium are based upon recent Supreme Court cases decided upon considerations having absolutely no

relevance to a lawsuit filed under the Longshore and Harbor Workers Compensation Act.

COUNTER STATEMENT OF THE CASE

Respondents do not consider it necessary to provide an extensive counter statement of the case to demonstrate that the issues in the petition were correctly decided below and are not appropriate for Supreme Court review. This was a personal injury lawsuit filed by a harbor worker pursuant to 33 U.S.C. Section 905(b) on the ground that the respondent's employer, Sealand, operating in a dual capacity as a land based stevedore and as a vessel owner, was negligent in its vessel operating capacity. The graveman of the action was that petitioner failed to provide a reasonably safe means of access and egress to its barge for "*inter alia*" failing to carry a portable gangway on board. As a result, the ladder, provided for access to the respondent Fanoli, slipped and caused him to suffer grievous injuries. There is no question that the respondent's proofs demonstrated negligence against the petitioner in its capacity as a vessel owner. Petitioner seeks to bar this suit by contending, contrary to all authority, that although respondent was a covered employee within the meaning of § 905(b), he had no right to avail himself of the right to sue his employer for negligence in its dual capacity as a vessel owner. This same contention has been argued before several Circuit Courts and to the Supreme Court of New Jersey. Every single panel has rejected the argument.

There is one misstatement of fact in respondent's brief which should probably be brought to the attention of the court. Petitioner attempts to deny that it had abandoned all efforts to have the trial court charge a potential defense of negligence by fellow employees of respondent. (*See* Petitioner Brief at 38a). There must be no misunderstanding that there was an unequivocal waiver of this potential defense petitioner belatedly seeks to raise. (*See* 38a).

Counsel instructed the court there was no such defense. While there was a colorable legal basis to insist on this defense, (by reference to language in a Second Circuit opinion), counsel instead insisted that the defense did not exist. There was no discernible reason for petitioner to take this position. It now seems apparent that counsel's strategy was to forego the possibility of mitigating his client's exposure at the trial level by not requesting the defense. The petitioner would then seek to establish an appeal in two ways. First by complaining they didn't get the defense. Second by using it as a way of differentiating the status of harbor workers and longshoremen. This should be pointed out. Petitioner waived the right to seek the defense and must live with the consequences of that decision.

REASONS FOR DENYING THE WRIT

I.

THIS MATTER IS NOT APPROPRIATE FOR SUPREME COURT REVIEW AS THERE IS NO CONFLICTING LEGAL PRECEDENT.

The right of an injured harbor worker to sue his vessel owning employer for negligence under 33 § 905(b), as a limited exemption to the exclusivity provisions of 33 U.S.C. § 905(a), is specifically authorized by this Court's holding in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 76 L. Ed. 2d (1983). Petitioner has contended that this right is limited to those covered harbor workers who are longshoremen and not those in any other job category.

Similar efforts to preclude covered workers in other job categories from availing themselves of this right were rejected by two Circuit Courts prior to the *Jones & Laughlin* decision; *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980) and *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789

(2d Cir. 1979). This Court did not overrule either case in *Jones & Laughlin*. Subsequent to the *Jones & Laughlin* decision, the Fifth Circuit on at least three more occassions, in *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987) involving a switcher; *New v. Associated Painting Services, Inc.*, 863 F.2d 1205 (5th Cir. 1989) involving a sandblaster/painter; and *Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528 (5th Cir. 1991), a heavy equipment operator, has reiterated that in the narrow circumstances where a covered employee could demonstrate negligence by its land based employer in its vessel operating capacity, a negligence action was cognizable under 905(b).

The District Court of Maryland in a case brought by a pile driver, *Presley v. Healy Tibbits Const. Co.*, 648 F. Supp. 203 ((D. Md. 1988) followed the same logic found in the Fifth Circuit. By implication the Fourth Circuit, in *Richardson v. Norfolk Shipbuilding and Drydock Corp.*, 621 F.2d 832 (4th Cir. 1980) involving a sandblaster, and the Eleventh Circuit with a scuba diver/maintenance worker, in *Roach v. M/V Aqua Grace*, 857 F.2d 1575, (11th Cir. 1988), also recognized the right of a nonlongshoreman covered employee to sue his employer under the dual capacity doctrine. In fact, every single court that has addressed the issue has interpreted the Act in accordance with the respondent's position. This case law was relied upon by the Appellate Division of New Jersey in the instant matter. There is no conflict within the Circuit Courts of the United States or between the highest courts of any states on this issue.

II.

STATUTORY CONSTRUCTION CLEARLY SUPPORTS THE CASE LAW.

If the Court were to analyze the substance of petitioner's arguments, their obvious shortcomings are readily apparent.

First the interpretation of 905(b) in the cited cases finds overwhelming support under princples of statutory construction both by an analysis of the language and by evolutionary changes made between 1972 and 1984. Petitioner's arguments are thereby belied.

It appears to be counsel's contention that the second sentence of 905(b), "if such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel", is the sentence which enables a worker to sue his vessel owning employer. It further appears that the omission of the words "as a third party" in this sentence is significant to this interpretation. We initially observe that from an analysis of the language alone, this sentence does not provide authorization for anything, but rather imposes limitations upon an already conferred right. There are sound reasons, to be discussed *infra,* that this specific class of employees had this limitation imposed upon its right to sue. (*See* H.R. No. 92-1441 at p.7). It is disingenuous to believe that Congress intended to create a right to sue in this sentence.

We next turn to the absence of the language, "as a third party". We previously argued that it was indeed significant that the words "as a third party" were used rather than, for instance, the words "who is a third party". We suggested the phrase was akin to the literary device of simile as it did not necessarily refer to one who is truly a third party as that term is usually understood. This is evident from the fact that an employer may wear several hats and an employee may be under the umbrella of one but not the other. In that case, suit would be brought against the employer "as if it were a third party". This Court has utilized the term third party to designate the employer in such circumstances. In *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 61 L. Ed. 2d 521 (1979) at p. 266 in discussing the circumstances

of a longshoreman employed directly by the vessel, the Court referred to this type of case as a *third party suit* (emphasis added). Its omission in the second sentence can therefore have no bearing on the interpretation given by the courts. This Court in *Edmonds* has in effect read it into the language of the second sentence.

Statutory construction is also revealed by an analysis of the manner in which the Act was amended in 1984. In 1984 the ship repairman's right to sue his vessel owning employer in any capacity was specifically extinguished. Although not at issue here, we suggested below that this amendment was necessitated by the anamoly of having a vessel owner liable to a repairman who fixes its ship. The point being that with respect to the 1984 amendments one category of covered employees, ship repairmen, were given the most limited rights to sue their employers. They had none. Petitioner suggests that in the 1972 Act, only the repairman and longshoreman had the right to sue their employers, thus placing them in a superior position to all other covered employees. In 1984 when the repairman lost his right to sue his employer did he suddenly drop down to being the most poorly situated covered employee? It would appear nonsensical that the repairman would have gone from having superior rights to no rights. Moreover the 1984 Act demonstrates that Congress was fully capable of specifying which category of employees could not sue their vessel owning employers. If Congress intended that all other covered employees could not sue their vessel owning employers would it not have been imminently logical for it to say so. Statutory construction clearly supports the case law.

III.

THE PRESENT CONSTRUCTION IS CONSISTENT WITH ACHIEVING THE PURPOSES OF THE ACT.

The House and Senate Reports read as a whole unequivocally

demonstrated the presence of several problems to be addressed. Compensation benefits were woefully inadequate and with the unfettered right to sue at law under the doctrine of unseaworthiness, (*see Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099 (1946)) which was a strict liability concept, (*Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 4 L. Ed. 2d 941 (1960), the courts were inundated with cases. The situation was further exacerbated after this Court's holding in *Ryan Stevedoring Co., Inc. v. Pan Atlantic S.S. Co. Inc.*, 350 U.S. 124, 100 L. Ed. 133 (1956) which permitted the vessel owner to obtain indemnity for their damages from the employer on the now infamous theory that the stevedore breached an implied warranty of a workmanlike performance. Thereafter, efforts to stem the tide of lawsuits, through a tactic of the vessel hiring the longshoreman directly, were stopped by this Court's holding in *Reed v. The S/S Yaka,* 373 U.S. 410, 10 L. Ed. 2d 448 (1983).

In order to achieve the goals of promoting the safety of longshoreman and other harbor workers, insulating stevedores from liability law suits and unclogging the court system, Congress took a number of steps. Compensation benefits were vastly increased thereby eliminating the motivation for longshoreman to choose a liability lawsuit against the vessel owner over compensation benefits. Second, all covered employees were specifically prohibited from proceeding against the vessel for breach of the warranty of seaworthiness but were instead limited to a negligence claim. Third, all forms of indemnification or contribution of a vessel by the stevedore for breach of either an expressed or implied warranty of workmanlike performance were eliminated.

It is clear that with respect to promoting the goal of placing these shoreside workers in the same position as their land based counterparts, Congress needed to eliminate the remedy of

unseaworthiness which more than anything else set the shoreside worker apart.

The seaworthiness doctrine was developed to protect seamen from extreme hazards incident to their employment which frequently required long sea voyages and duties of obedience to orders not generally required of other workers. *See* H.R. No. 92-1441 at p.8. The rationale which justified holding the vessel absolutely liable to seamen where the vessel was unseaworthy, did not apply with equal force to longshoremen and other nonseamen working on board of a vessel while it was in port. *Id.* at 8. Thus the covered harbor worker was left with a negligence action similar to that of a land based employee rather than the strict liability concept of unseaworthiness.

Congress clearly rejected efforts by the shipping industry to avoid liability suits altogether and limit the harbor worker strictly to compensation. *See* H.R. 305 at 87. In enacting the second sentence, Congress recognized that under *Reed* there would be circumstances when the vessel employed longshoremen directly. The House Report demonstrates the need for special provisions dealing with that scenario. In order to effectuate the purpose of the Act to insulate the stevedore from liability lawsuits, directly or indirectly, the second sentence was enacted to demonstrate that only in the limited circumstance of vessel occasioned negligence rather than stevedoring negligence would the employer be liable in a negligence lawsuit.

By way of example we can observe how congressional objectives could be thwarted without the presence of the second sentence. A longshoring gang employed by a vessel performing its own stevedoring arrives on the vessel. A member of the gang spills grease on the deck and another longshoreman slips on it and is injured. Without the second sentence limitation this suit would have been cognizable and resuscitate the problems of *Reed*

v. Yaka, supra. The vessel owner would again be liable due to its activities as a stevedore. The scenario could be repeated and subject the stevedores to liability through abuse and collusion. Moreover the courts would inevitably be overrun again. This is precisely the reason the second sentence was enacted.

An employer who pays compensation benefits as petitioner Sealand does here, has a lien of 100 percent against the proceeds of any recovery obtained in a judgment at law. It can be fairly stated that the compensation rate for a longshoreman is relatively generous due to the combined efforts of the interested parties during the congressional debates of 1972. It would indeed be the rare instance when an action at law would even be economically viable.

The function this type of suit serves consistent with the purposes of the Act, is to preserve the action at law where the vessel owner is actually negligent. The suit such as the one here prevents the "end run" defense which vessel owners had formerly used as a tactic to immunize itself from suit no matter how negligent they were.

Even petitioner would have to agree that if respondent John Fanoli had been hired through an outside contracting service he would be able to sue the vessel for its negligence. But by hiring its own shoregang, Sealand could be viewed as trying to do indirectly what it could not do directly. Congress wanted to avoid having the question of the viability of suit to depend upon whether the potential tortfeasor employs the worker directly or indirectly.

There is a final possibility that could exist if petitioner's position was correct. In light of the Supreme Court decision in *McDermott International, Inc. v. Wilander,* 111 S. Ct. 807 (1991), respondent John Fanoli would be classified as a seaman with the right to bring his suit under the Jones Act, 46 U.S.C. § 888 *et*

seq. and general maritime law thereby providing him with a strict liability claim for unseaworthiness. We do not urge the court to review this matter for that possibility but we would suggest that the only party harmed by the failure to have Mr. Fanoli proceed under seaman status was John Fanoli and surely the petitioner would not be seeking to have the court find that these cases should be tried under those principles.

IV.

THE PETITIONER HAS FAILED TO RAISE ANY OTHER ISSUE IN THIS FACT SPECIFIC CASE WORTHY OF SUPREME COURT REVIEW.

The petitioner's remaining contentions are without merit and to the extent there are any issues worthy of discussion, their determination was specific to the particular facts of this case. As such they do not justify Supreme Court review. Petitioner argued that there were no rights to a jury trial, prejudgment interest, or to a recovery for loss of consortium.

With respect to the right to a jury trial, this court has already provided authorization for jury trials in these cases in *Fitzgerald v. United States Lines Company,* 374 U.S. 18 (1963). Moreover, the Seventh Amendment fashions the federal policy favoring jury decisions of disputed factual questions. *Byrd v. Blue Ridge Road Electric Cooperative,* 358 U.S. 585, 78 S. Ct. 893, 2 L. Ed. 593. Finally there was an independent basis for a jury trial in this particular case since diversity of citizenship existed for jurisdiction.

Clearly the recovery of prejudgment interest in a maritime case is the rule rather than the exception. *Hernandez v. M/V Rajaan,* 841 F.2d 582 (5th Cir.), *rehearing denied, opinion corrected on other grounds,* 848 F.2d 498 (5th Cir.), *cert. denied,* 109 S. Ct. 530 (1988), 109 S. Ct. 837 (1989); *Webster v. M/V*

Moolchand, Seethia Liners, Ltd., 730 F.2d 1035, (5th Cir. 1984); *Barnett v. Sea-Land Service, Inc.*, 875 F.2d 741 (9th Cir. 1989); *Bates v. Merritt Seafood, Inc.*, 663 F. Supp. 915 (D.S.C. 1987); *Taliercio v. Compani Empressa Lineas Argentina*, 761 F.2d 126 (2d Cir. 1985); *Harrison v. Flota Mercante Gran Columbiana, S.A.*, 574 F.2d 968 (5th Cir. 1978).

The case relied upon by the respondent *Monessen Southwestern Railway v. Morgan*, 486 U.S. 330, 108 S. Ct. 1837 (1987) is not only not controlling, but has no relevance whatsoever to the question of prejudgment interest in this case. This is so because the *Monessen* holding and the rationale of that case are specific to the Federal Employers Liability Act (FELA), 45 U.S.C.A. §§ 51 *et seq.* and are based on considerations demonstrably inapplicable to 905(b). Counsel's complaint can only be with the methodology by which the prejudgment interest was imposed. However it is observed that petitioner, presumably aware that prejudgment interest was recoverable in a maritime case, never objected to the trial judge's handling of the prejudgment interest question until the case was over. It would seem that fundamental fairness would require that prejudgment interest be recoverable in this particular case since it was not imposed on the full amount of the verdict but rather only on the net amount of the verdict after the reduction for compensation payments. Moreover, it did not run from the day of injury as it might have under the procedure followed in some federal jurisdictions, *see Barnett v. Sea-Land Service, Inc. supra.* Rather it was only computed from the date of the filing of the complaint. Finally as the Appellate Division of New Jersey observed there was relevant authority supporting the methodology by which prejudgment interest was imposed, *Randolph v. Laeisz*, 898 F.2d 984 (5th Cir. 1990).

Petitioner equally misplaces reliance on *Miles v. Apex Shipping Co., Inc.*, 498 U.S. ____, 112 L. Ed. 2d 275 (1990) for support of its argument, never raised at trial, that respondent

Molli Fanoli was not entitled to recover for loss of consortium. The Judiciary Act, 28 U.S.C. § 1333 provides for the "savings to suitors of all the remedies to which they are otherwise entitled." Under *Sealand v. Gaudet*, 414 U.S. 573, 39 L. Ed. 2d, 94 S. Ct. 808 and *American Export Lines v. Alvez*, 446 U.S. 274 (1980) the spouse of an injured harbor worker suing under 905(b) has a valid claim for loss of consortium which has never been abrogated. *Miles v. Apex* cannot possibly affect the right to this remedy.

The *Miles* case involved a Jones Act seaman who was killed in an assault by a fellow crewmember. The decision in *Miles* was influenced by the presence of a strict liability doctrine being made available in a wrongful death case. The entire analysis is totally unrelated to the context of the present action which involves concepts of negligence rather than the strict liability concept of unseaworthiness. Most importantly the respondent John Fanoli survived. It is apparent that the case of *Miles v. Apex* had no impact on the viability of the previously undisputed right of Molli Fanoli to bring a claim for her loss of consortium.

CONCLUSION

The facts and circumstances of this case meet none of the criteria or considerations for the granting of a writ of certiorari as set forth in Rule 10 of this Honorable Court. To succinctly summarize, there is no support in the law for petitioner's proposed alterations in the well founded reasoning of the cited cases. In view of the dearth of opinions about this issue in the years since these rights have been recognized, there is clearly no evidence of a recurring problem. Thus, there is no policy reason justifying a plenary hearing of this matter.

The petition for certiorari should be denied.

Respectfully submitted,

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